

3/22/2005



February 17, 2005

Dear Parks and Recreation Board:

Randy Jewart, Artist and Project Manager of Austin Green Art, has approached the City of Austin Art in Public Places Program with a proposal for a temporary sculpture installation beginning June 2005. The sculpture installation is scheduled to coincide with the National Americans for the Arts Conference and Public Art Pre-conference. The pre-conference is entitled The Lay of the Land: Public Art, Politics, and the Environment with the intent to highlight Austin's treasure of green spaces. We anticipate over 800 arts administrators, artists and arts supports to grace our city from June 8<sup>th</sup> – 13<sup>th</sup>.

The duration of Austin Green Art exhibition would vary depending on the nature of the artworks. There is anticipated 5 – 10 artworks to be sited around downtown Austin including city parkland and privately developed land. Each artwork proposed for city property would follow the established City of Austin Artwork Donation Process with review and approval by the User Department, Art in Public Places Panel and Arts Commission prior to installation.

Temporary artwork donations have long been desired by the arts community. As you may know, the City of Austin's Public Art Fund administered through the Art in Public Places Program from Capital Improvement Projects has funded permanent works of art for new and remodel buildings and developed parkland, serving as cultural investments for the City. This temporary sculpture exhibition will serve the citizens of the city with quality works of art on a temporary basis while paying tribute to the sustainable aspects of our natural and built environments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Megan Weiler", with a long, sweeping horizontal line extending to the right.

Megan Weiler, Administrator  
Art in Public Places  
Cultural Arts Division  
Economic Growth & Redevelopment Services

Enclosures: Austin Green Art Mission Statement  
Austin Green Art flyer  
Art in Public Places Panel letter

## **Austin Green Art Temporary Sculpture Exhibition**

### **Mission**

Produce a series of ongoing outdoor sculpture exhibitions that enhances Austin's role as an international leader in environmental thinking.

### **What is "green" art?**

"Green" art is the work produced through this unique collaborative process. It can be any size, shape, material or concept. Artists and curators are chosen who have a proven engagement with natural materials or environmentally thematic concepts. Initially, they are invited to come to Austin and are immersed in the environmentally focused culture here. They tour the city and meet with agencies, corporations and advocacy groups. They then propose and realize a work or project that is inspired by this opportunity to add to the green dialogue.

### **Project Goals**

- Exhibit visually engaging and conceptually rich environmental artwork that is publicly accessible
- Showcase local and regional artists and bring in national and international artists
- Create a synergistic environment with the Austin "green" community of businesses and citizenry by engaging them as hosts, sponsors and collaborators with the project mechanics and the art itself
- Provide quality photo, video, and written documentation of the process and finished works in the series
- Celebrate Austin as a green destination (cultural tourism)
- Promote a discussion about environmentally sensitive issues and provide a public forum for that dialogue
- Maintain the strongest curatorial stance possible with focus on the artworks, the sites and the current environmental issues



Public Art for a  
Green Community

Launch Party - November 20th 7 - 9 p.m.  
Factory People 1325 S. Congress Avenue

## Come share the Green Love

Austin Green Art is an important new initiative to engage Austin residents, businesses and visitors in environmentally-themed public art.

We invite you to join us to celebrate the unique collaboration of the environmental and arts communities, and to share your ideas, energy, creativity and resources.

## Inspirational Pontificating

Randy Jewart, Austin Green Art, Director

Megan Weiler, Austin Art in Public Places

Danielle Roney, Fulton County Georgia Public Art

Piny Fisk III, Center for Maximum Potential Building Systems

## Collaboration

You can participate as an artist, sustainability guru, volunteer or corporate sponsor.

## Indulgence

DJ tunes

Libations courtesy of Austin's Live Oak Brewing

Glamorous setting, brilliant minds, beautiful people

## Action

Add to Austin culture by helping Austin Green Art conceive and realize publicly accessible art by the world's leading visual artists.

## Partners:

City of Austin Art in Public Places

Texas Commission on the Arts

Center for Maximum Potential Building Systems

Austin American-Statesman

Austin Community Foundation

Contact:

512.743.4245

[randy@austingreenart.org](mailto:randy@austingreenart.org)

[www.austingreenart.org](http://www.austingreenart.org)

Randy Jewart  
1400 Wooten Drive  
Austin TX 78757

October 7, 2004

**Subject: Austin Green Art — Temporary Art Sculpture Program**

Dear Randy,

Thank you so much for presenting your proposal for the Austin Green Art temporary sculpture program at this month's Art in Public Places (AIPP) meeting. The AIPP Panel commends you for bringing such an appropriate initiative to Austin. We are excited by the proposal and whole-heartedly support it.

Having a temporary sculpture program would benefit the city, but one that focuses on environmental artwork is ideal and wonderfully appropriate for Austin. Not only would it showcase local, regional, and international artists, but it would encourage collaboration between artists, the green business community, and the citizens of Austin, and promote a public dialogue about environmental issues.

We believe that the Austin Green Art is a unique opportunity that will enhance Austin's role as a leader in both public art and environmental awareness. The AIPP Panel—collectively and individually—strongly supports Austin Green Art project. We will support it any way that we can, and we urge the Austin art, green, and business community to do the same.

Sincerely yours,

Anne Beamish, AIPP Chair  
Lis Salaiz, AIPP Vice Chair  
Pamela Cunningham, AAC Liaison  
Sunyong Chung  
Ambray Gonzales  
Charles Randolph  
Herlinda Zamora



## **MEMORANDUM**

**TO:** Warren Struss, Director  
Parks and Recreation Department

**FROM:** Sondra Creighton, Director  
Department of Public Works

**DATE:** January 31, 2005

**SUBJECT:** Request for Use Agreement Across Parkland  
Barton Springs Lift Station Relief Tunnels 1 & 2  
CIP No. 4570-237-8403; eCapris 4926.081

The Department of Public Works, on behalf of the Austin Water Utility, hereby requests a permanent and temporary use agreement for the construction, operation and maintenance of the proposed 33-inch wastewater line to be installed in two tunnel construction projects under CIP No. 4570-237-8403. Attached are the following documents for your use and consideration to support this request:

- A. General Location Map,
- B. Information Packet,
- C. Tree Survey (to be provided), and
- D. Field Note descriptions (to be provided).

From these documents, you will note that the permanent use portion of the proposed agreement contains a total of \_\_\_ acres for permanent wastewater easement and \_\_\_ acres for the temporary easements.

The wastewater tunnel project includes construction of approximately 3,400 linear feet of tunnel (60" to 96" diameter) which will have a 33-inch wastewater pipe to convey wastewater flows from the Barton Creek basin. This will allow the deteriorated Barton Creek Lift Station to be decommissioned. The proposed alignment through Zilker Park will be from the existing Barton Creek Lift Station to a proposed work shaft/permanent manhole near the pedestrian bridge over Barton Creek. This is a distance of 1,900 linear feet, and includes a portion of existing wastewater line. Tunnel Section 1 ties to a shaft in the work area where the deep Tunnel Section 2 begins and it proceeds east along Toomey Road for 1,600 linear feet to the main work shaft and work area, located between the ballfields on Toomey. A temporary lift station will be located in the shaft. This request is for permanent wastewater easements, and temporary workspace easements, within the parkland along Toomey Road. The impact to the ballfield area on Toomey will be limited to temporary work spaces for contractor laydown, the shaft are work space, and tie-ins to the existing wastewater lines adjacent to the proposed shaft/lift station. Some parking will be unavailable during the construction period of 13 months.



**Information Packet  
For Parkland Use Agreement**

**Barton Springs Lift Station Relief Tunnel – Section 2  
Sub Project # 4926.081  
CIP No. 4570-237-8403**

**to serve the  
BARTON CREEK WASTEWATER COLLECTION SYSTEM**

**Prepared by the  
Austin Clean Water Program**

**on behalf of the  
City of Austin  
Austin Water Utility  
and  
Department of Public Works**

temporary lift station. The affected parkland is not within the 100-year floodplain of Barton Creek.

The proposed tunnel will require a work space and staging area to be located within the parkland adjacent to the ballfields. The activity at this location will include shaft excavation, removal of excavated material from the shaft, loading in materials to the tunnel, movements of haul trucks, storage of pipe, and field offices for the contractor. The temporary work space easements for this scope will total about \_\_\_ acres. Bidding was delayed to allow the tunnel shaft and temporary lift station to be redesigned such that it could be relocated from Dawson Road (proposed Town Lake Park) to the site on Toomey. The new bid opening date is scheduled on March 10, with work to begin in Summer 2005. Work will end in Fall 2006. At that time, only a fenced area enclosing the temporary lift station will remain.

### **SHORT TERM EFFECTS OF CONSTRUCTION**

The tunnel shaft workspaces are all currently in open parkland areas with no dedicated uses. The construction layout is intended to avoid interference with any park functions, including nearby trails or ballfields. All work areas will be fenced and sedimentation controls installed. Construction equipment will disturb the ground cover in the work areas, which consists chiefly of Bermuda and/or St. Augustine grass. The trees that are adjacent to the work areas will be protected by keeping the limits of construction away from them. Areas of disturbance will be revegetated. Vehicular access to the work area on Toomey will use Toomey, but will leave via the parking lot by the PARD building to access Lamar at the light. The equipment at each shaft location will likely include a crane, a blower to provide air inside the tunnel, electrical transformer bank, open storage of materials and office trailer. The tunnel is about 60 feet deep, with over 10 feet of rock over the tunnel and another 40 feet soil over the top of rock. No tree roots will be impacted by the deep tunnel.

### **LONG TERM EFFECTS OF CONSTRUCTION**

There will be no long-term effects due to the project. Construction of the proposed wastewater line in the tunnel will allow the Barton Springs Lift Station to be decommissioned, and the potential for sewage overflows associated with lift station operations will be eliminated.

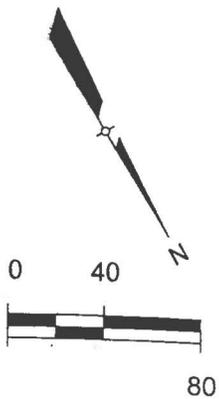
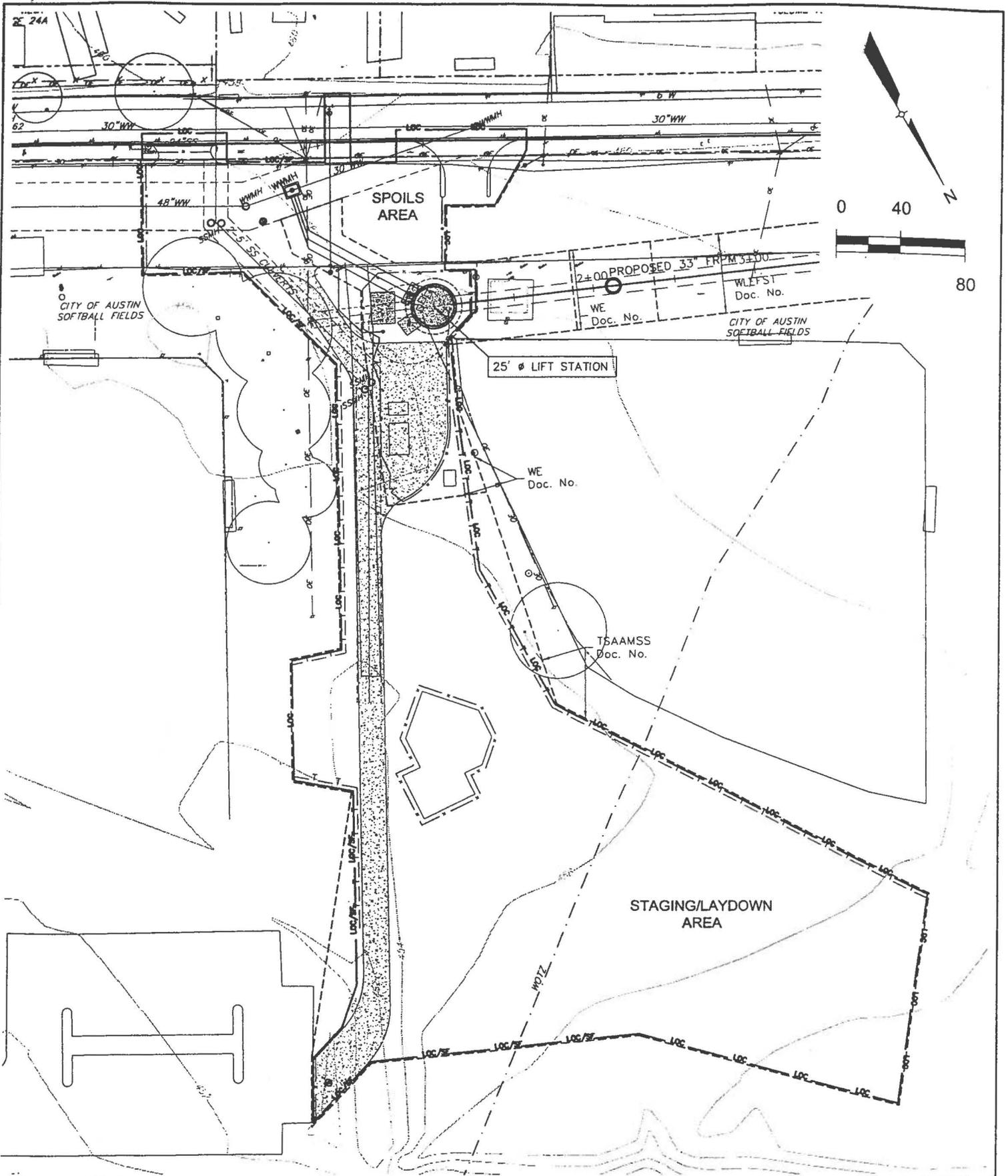
A long-term impact on the park that is planned by PARD with assistance from AWU is relocation of the maintenance facility that is currently located next to the Caretakers House. In exchange for the several work areas in parkland, including use of the proposed staging area in the portion of Zilker Park west of Mo-Pac, AWU will assist PARD with development of a new maintenance facility at the staging area site after the relief main project is complete. Details are being worked out between PARD and AWU.

### **RESTORATION PLAN**

All disturbed land will be restored and revegetated to equal to existing conditions. Any trees that need to be removed will be replaced (no removals expected). Areas used for the work will be left at original grade.

All site restoration will be completed in accordance with the *Standard Specifications and Construction Standards* of the City of Austin. All construction and site restoration for that portion of the project within parkland will also be completed in accordance with PARD's *Construction in Parks Specifications*.

As with all City construction projects, the Contractor will be required to provide a one-year warranty of his work including such restoration, revegetation and tree replacement.





Information Packet  
For Parkland Use Agreement

Govalle 1: South 2<sup>nd</sup> Street & East Bouldin Creek Relief Interceptor – Town Lake Park Segment  
(Part of the Govalle 1: South 2<sup>nd</sup> Street & East Bouldin Creek Re-route Project)  
CIP No. 4570-237-4559

to serve the  
GOVALLE 1: EAST BOULDIN CREEK WASTEWATER COLLECTION SYSTEM

Prepared by the  
Austin Clean Water Program

on behalf of the  
City of Austin  
Austin Water Utility  
and  
Department of Public Works

## **PROJECT DESCRIPTION AND SCHEDULE**

This wastewater line project will include the construction of approximately 600 linear feet of 24-inch diameter wastewater interceptor and related appurtenances in the general area from Barton Springs Road to Riverside Drive, directly west of the Palmer Events Center. The project routing, design and bid documents are being prepared by the team led by Binkley & Barfield, as part of the Austin Clean Water Program (ACWP). The proposed routing is shown on the General Location Maps. Most of the segment in Town Lake Park will be bored, such that surface disturbances will be limited to the bore and receiving pits, related work areas, and construction access routes. The affected parkland is not within the 100-year floodplain.

The proposed wastewater line will require a working space and staging area to be located within the parkland adjacent to the proposed wastewater line. The activity at this location will include bore pit excavation, removal of excavated material from the pits, loading of materials to the bore pit, movements of haul trucks, and storage of pipe and manholes. The permanent wastewater easement is approximately 0.262 acres, while temporary easements will total approximately 0.870 acres.

## **SHORT TERM EFFECTS OF CONSTRUCTION**

The easements are all currently in open parkland areas with no dedicated uses at this time. The construction layout and tunneling requirements are intended to avoid interference with any Palmer Event Center functions. The driveway to the Palmer Events Center's parking garage will not be affected. The trees that are adjacent to the work areas will be protected by keeping the limits of construction away from them. Areas of disturbance will be revegetated. Vehicular access to the work area will use Dawson Road. The equipment at each shaft location will likely include a crane, a blower to provide air inside the tunnel.

## **LONG TERM EFFECTS OF CONSTRUCTION**

There will be no long-term effects due to the project. Construction of the proposed wastewater line may allow the various aerial crossings over East Bouldin Creek to be decommissioned, and the potential for sewage overflows or spills associated with these aerials to be eliminated.

## **RESTORATION PLAN**

All disturbed land will be restored and revegetated to equal to existing conditions. No trees are to be removed as part of this project. (This includes the trees that were recently transplanted into Town Lake Park.) Areas used for the work will be left at original grade. Whenever possible, the proposed wastewater improvements will be installed at a grade suitable for the proposed Town Lake Park Improvements.

All site restoration will be completed in accordance with the *Standard Specifications and Construction Standards* of the City of Austin. All construction and site restoration for that portion of the project within parkland will also be completed in accordance with PARD's *Construction in Parks Specifications*.

As with all City construction projects, the Contractor will be required to provide a one-year warranty of his work including such restoration, revegetation and tree replacement.







MEMORANDUM

To: Parks and Recreation Board

From: Warren W. Struss, Director  
Parks and Recreation Department

Date: February 22, 2005

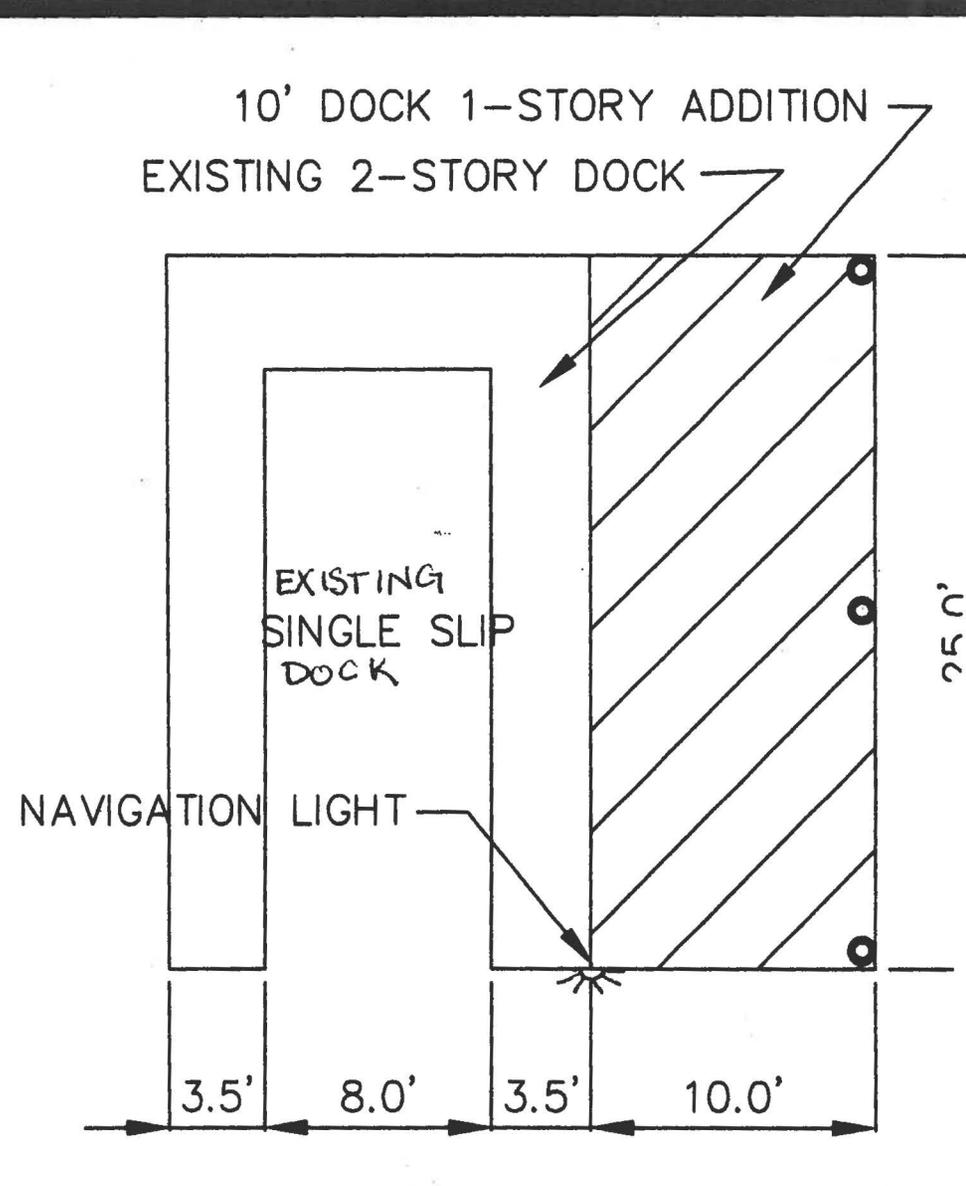
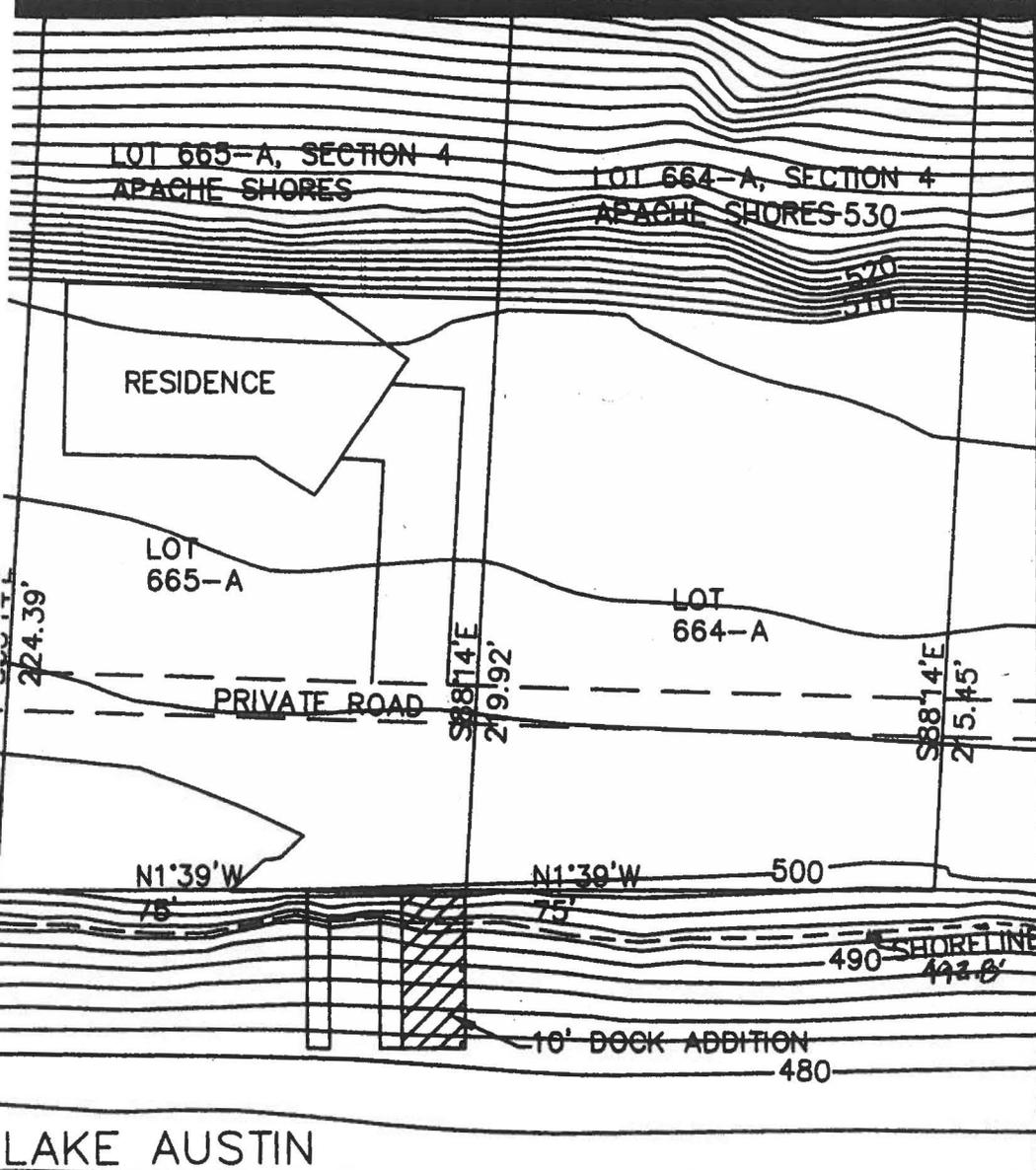
Subject: Boat Dock at 2309 Big Horn  
Case Number SP-05-0567DS

A request has been received from Bruce Aupperle on behalf of Glen Leblanc to add a sun deck onto an existing single slip dock at 2309 Big Horn.

The Parks and Recreation Department staff has reviewed plans for the proposed project and finds they do not meet the requirements of Article XIII, Section 25-2-1176, (Regulations for the Construction of Boat Docks) of the Land Development Code. The proposed dock is greater than 20 percent of the shoreline width of the lot on which the structure is to be constructed and within 10 feet of the side property line.

Parks and Recreation Board approval is required for structures greater than 20 percent of the shoreline width of the lot on which the structure is to be constructed and for structures to be constructed within 10 feet of the side property line.

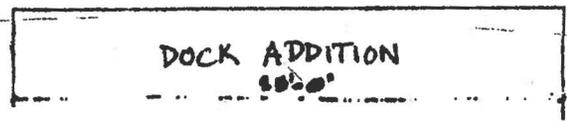
Warren W. Struss, Director  
Parks and Recreation Department



# BOATDOCK PLAN

N.T.S.

75  
20  
15.00'



# What an Applicant for a City of Austin Board Should Know About Conflicts of Interest

Prepared by the City of Austin Integrity Office  
For more information call 974-2180

## Introduction

Thank you for your interest in public service as an appointee to a City of Austin board or commission. Local government depends on the service of community-minded individuals to perform many of its services and regulatory responsibilities. However, with public service come additional responsibilities of which you should be aware. As a public servant you become subject to laws that are designed to ensure the transparency and impartiality of your government. Because the application of these rules requires a close knowledge of an individual's relationships and financial affairs, it is ultimately the personal responsibility of each board member to be aware of the relevant rules and to comply with them.

The City has many citizen advisory boards that are variously called board, commission, committee, council, task force, etc. These terms are all synonymous. For ease of reference, this paper uses the term "board" throughout. Some of these boards have responsibilities that are purely advisory. Other boards exercise independent authority, for example (and among others) the Planning Commission, the Board of Adjustment, and the Urban Renewal Board.

Members of all City boards are subject to the City's ordinances regarding conflicts of interest. A member of a board that exercises responsibilities beyond those that are purely advisory is also subject to the state conflict of interest statute (Chapter 171 of the Local Government Code). That statute differs in the detail of its application, and in the severity of its penalties, from the City ordinances that are discussed here, and is addressed separately at the end of this paper. In addition, some board actions that involve the use of federal funds can have conflict-of-interest requirements under federal law.

Of course, a member of a City board is always at liberty to recuse on any matter if the member has a private interest that may affect (or appear to affect) the member's judgment. Please do not mistake this brief explanation of the rules to be an endorsement of mere compliance as a standard of behavior. The rules merely set a minimum standard in this regard by presuming that a conflict exists in the case of certain relationships. Keep in mind that the purpose of the law is to create and maintain public confidence in the decisions of the government by avoiding even the appearance of impropriety.

Some City board members are subject to annual personal financial disclosure requirements.<sup>1</sup> These requirements, when applicable, vary from board to board and are not discussed in detail here. However, applicants for appointment to a City board should consider whether they will be uncomfortable with these required disclosures.

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<sup>1</sup> City Code, §2-7-71 et seq.

If you are interested in urban renewal, you should be aware that becoming a city official may restrict your ability to own an interest in an urban renewal project.<sup>2</sup>

### **Lobbying and City Board Membership**

A person who is registered or who is required to register as a lobbyist under the City's lobbying ordinance, or who or is an employee of a person required to register may not serve on a City board or commission within three years of engaging in lobbying activity.<sup>3</sup> The City's lobbying ordinance requires registration, with some exceptions, by a person who receives compensation of \$200 or more in a calendar quarter for lobbying, receives reimbursement of \$200 or more in a calendar quarter for lobbying, or expends \$200 or more in a calendar quarter for lobbying, or who lobbies as an agent or employees of a person who meets one of those thresholds.<sup>4</sup> Lobbying is communicating (other than by public expression at a meeting held under the Open Meetings Act) in an effort to influence or persuade a City councilmember, certain City employees<sup>5</sup>, or certain City board or commission members<sup>6</sup> on a municipal question (a proposed or proposal for an ordinance, resolution, motion, recommendation, report, regulation, policy, appointment, sanction, and bid, including the development of specifications, an award, grant, or contract for more than \$2,000). If you think you may be subject to the registration requirement, please review the requirement and the exceptions carefully.<sup>7</sup>

### **Minimum Standards of Conduct**

A City board member may not:

\* transact any business in the member's official capacity with any entity in which the member

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<sup>2</sup> Local Government Code, § 374.908.

<sup>3</sup> City Code, §2-1-8.

<sup>4</sup> City Code, Chapter 4-8.

<sup>5</sup> The city manager, an assistant city manager, their aides, the city attorney and an assistant city attorney, a department and deputy department head, and, where no deputy department head serves, the first principal assistant of the department. City Code §4-8-3(25).

<sup>6</sup> The Austin Airport Advisory Commission; Airport Zoning Commission; Arts Commission; Brackenridge Hospital Oversight Council; Building and Fire Code Board of Appeals; Building and Standards Commission; Telecommunications Commission; Civil Service Commission; Community Development Commission; Economic Development Commission; Electric Board; Electric Utility Commission; Environmental Board; Ethics Review Commission; Historic Landmark Commission; Human Rights Commission; Mechanical, Plumbing and Solar Board; Parks and Recreation Board; Planning Commission; Zoning and Platting Commission; a retirement board, including the Firemen's Relief and Retirement Fund Board and the Police Retirement Board; the Resource Management Commission; and the Water and Wastewater Commission; City Code §4-8-3(1) – (24).

<sup>7</sup> City Code, §§ 4-8-4 and 4-8-5.

has a “substantial interest” (this term is explained below),

- \* formally appear before the board of which he or she is a member while acting as an advocate for himself or herself, or for any other person, group, or entity,
- \* represent a private person or entity in an action in Municipal Court that was instituted by or arises from a decision of the member’s board,
- \* solicit or accept a gift or favor that might reasonably tend to influence the member in the discharge of the member’s duties or that the member should know has been offered with the intent or influence or reward official conduct,
- \* solicit or accept employment that could reasonably be expected to impair the member’s independence in judgment or the member’s performance of City duties,
- \* use City facilities, personnel, equipment or supplies for private purposes, except to the extent those things are available to the public.
- \* accept paid campaign work relating to a ballot proposition if the member’s board exercised discretionary authority with respect to the proposition and the member participated in the board’s discussion or vote.<sup>8</sup>

Some violations of these standards may also violate state laws with criminal penalties.<sup>9</sup>

### **Managing a Conflict; Recusal**

Conflicts can be managed by a variety of strategies, depending on the nature of the conflict, and the position and duties of the public servant. In some cases, the law will require a conflict to be managed in a particular way, and failure to take the necessary action may result in a breach of the City’s policies, and may even result in criminal liability.

Sometimes the rules simply prohibit the official from engaging in activity that may give rise to a conflict, for example a lobbyist serving as a board member is simply prohibited. In that case, recusal is insufficient.

On the other hand, when the conflicting relationship itself is not prohibited, the problem of a conflict can generally be managed by recusal. Recusal means taking no part in the decision or the decision-making process. You don’t have to be the final decision maker to be required to recuse, you just have to be part of the process.

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<sup>8</sup>City Code, §2-7-62(A), (B), (F), (G), (H)(1), (J), and (K).

<sup>9</sup>e.g., Penal Code, § 36.02 (Bribery); 36.08 (Gift to Public Servant); §39.02 (Abuse of Official Capacity).

The City Code requires a board member to recuse when the member has a “substantial interest” in a person or entity that would be “affected” by a vote of the board of which he or she is a member. To effectively recuse from a vote or decision, a member should not only refrain from voting, but also take no part in any discussions leading up to the vote. The City ordinance uses the phrase “may not participate in a vote or decision.”<sup>10</sup>

When recusal is required under the City ordinance, a public disclosure of the nature and extent of the interest must appear “in the official records of the body.”<sup>11</sup> Accordingly, a member should take care that the disclosure appears in the board's official minutes.

Both “substantial interest” and “affected” are defined terms that must be explained.

### **What “Affected” Means**

“Affected” means “reasonably likely to be subject to a direct economic effect or consequence, either positive or negative, as a result of the vote or decision in question.” For instance, a person or entity owning real property, entering into a contract with the City, or seeking a permit or franchise is “affected” by votes or decisions such as zoning of the property, approval of the contract, or granting of the permit. The term “affected” does not include those persons or entities that are subject to an indirect or secondary effect from official action. Creditors, independent contractors, or guarantors of a person “affected” by a vote or decision are not also deemed to be “affected” by virtue of their relationship with the affected person. The vote or decision need not be the only producing cause of the economic effect or consequence. It’s enough that the effect or consequence would be reasonably expected to occur.<sup>12</sup>

### **Substantial Interest**

A person has a "substantial interest" in another person (“person” includes associations, businesses, corporations, and government agencies<sup>13</sup>) or in an entity (“entity” includes any entity recognized by law through which business may be conducted<sup>14</sup>) if:

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<sup>10</sup>City Code, §2-7-63.

<sup>11</sup>Id.

<sup>12</sup>City Code, §2-7-2.

<sup>13</sup> City Code, § 1-1-2.

<sup>14</sup> City Code § 2-7-2.

- (1) the interest is ownership of 5% or more of the voting stock, shares or equity of the entity, or
- (2) the interest is ownership of \$5,000 or more of the equity or market value of the entity, or
- (3) funds received from the other person or entity during the previous 12 months or during the previous calendar year equaled or exceeded any one of the following:
  - (a) \$5,000 in salary, bonuses, boards or professional fees, or
  - (b) \$20,000 in payment for goods, products or nonprofessional services, or
  - (c) 10% of the person's gross income during that period, or
- (4) the person serves as a corporate officer or member of the board of directors or other governing board of the entity (this criterion doesn't apply to a non-profit entity or to a corporate entity owned by the City or created by the City Council), or
- (5) the person is a creditor, debtor, or guarantor of the other person or entity in an amount of \$5,000 (this criterion doesn't apply to a home mortgage loan for the person's homestead or to a loan or lease of a personal automobile if entered into at a market rate with a commercial lending institution before the previous 12 months).<sup>15</sup>

A person has a substantial interest in real estate for purposes of Chapter 2-7 of the City Code if the person has a legal or equitable interest in the real property with a market value of \$5,000 or more.<sup>16</sup>

A substantial interest of a partnership, professional corporation, or other entity *is deemed to be* a substantial interest of a board member if:

- (1) the board member is a member of a partnership or professional corporation, or conducts business through another entity that has fewer than 20 partners or shareholders, or
- (2) the board member is a member of a partnership or professional corporation, or conducts business through another entity, and the official or employee has an equity interest, share, or draw equal to or greater than 5% of either
  - (a) the capital of the partnership, professional corporation, or other entity, or
  - (b) revenues of the partnership, professional corporation, or other entity.<sup>17</sup>

In addition, a board member *has a substantial interest in a client* of a partnership, professional corporation, or entity through which the board member conducts business if the official has personally acted in a professional or fiduciary capacity for that client within the preceding 24 months.<sup>18</sup> This applies regardless of the amount of funds received from the client.

*A substantial interest of a spouse of a board member is a substantial interest of the board*

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<sup>15</sup>Id.

<sup>16</sup>Id.

<sup>17</sup> City Code, § 2-7-61.

<sup>18</sup>Id.

*member*.<sup>19</sup> (Except that the substantial interests of a partnership are *not* deemed to apply to a board member solely because the spouse of the board member does business through the partnership or other business entity.<sup>20</sup> However, income from a spouse's partnerships, business entities, or clients may constitute a substantial interest<sup>21</sup>.)

### **Sanctions for a Failure to Recuse Under the City Code**

The City Code does not itself provide a criminal penalty for a failure to recuse with respect to a "substantial interest" as the term is defined in the City Code.<sup>22</sup> Instead, an alleged violation of the City Code's recusal requirement is to be heard by the Ethics Review Board through a procedure set out in §§ 2-7-41 through 2-7-48 of the City Code.

To summarize this process, the Ethics Review Board, either on receipt of a complaint or on its own motion, may conduct hearings to determine if a violation has occurred. If the Ethics Review Board finds that a violation has occurred, then it may impose a range of sanctions from a letter of notification (when it finds the violation is clearly unintentional) to a recommendation of removal by the City Council (when it finds that a serious or repeated violation has occurred through intentional or culpable disregard of the ordinance by a board member).<sup>23</sup>

However, even though the City Code does not create a criminal penalty for failure to recuse, it is an offense under state law if, with the intent to obtain a benefit or with the intent to harm or defraud another, a public servant knowingly violates a law relating to the public servant's office.<sup>24</sup> A City board member is a public servant, and the City Code's recusal requirement could be such a law. This offense is a Class A misdemeanor. It is punishable by a fine not to exceed \$4,000, up to a year in jail, or both.

In addition, the state law requiring recusal for a member of a board that exercises more than advisory power *does* have its own criminal penalties. See below for information regarding the application of the state recusal law.

### **Contracting With the City**

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<sup>19</sup> City Code, § 2-7-65(A).

<sup>20</sup> City Code, § 2-7-65(B).

<sup>21</sup> See City Code §2-7-2.

<sup>22</sup> City Code, §2-7-48(A).

<sup>23</sup> City Code, §2-7-48(B)(1)-(4).

<sup>24</sup> Penal Code, §39.02(a)(1), and (b).

The City does not prohibit advisory board members from bidding or contracting with the City. However, a bidder is excluded from bidding if the bidder has had any involvement in the design or specifications of the procurement, or if the bidder will have any role in the award of the contract or any advantage due to inside information. The rule is that you can participate in the development of the project or you can bid for the work, but you can't do both because it's anti-competitive. Of course, a City contract may also give rise to a substantial interest requiring recusal on an issue related to the subject matter of the contract.<sup>25</sup> The City's standard terms and conditions exclude city officers who have a role in the solicitation (board members are officers): "No officer, employee, independent consultant, or elected official of the City who is involved in the development, evaluation, or decision-making process of the performance of any solicitation shall have a financial interest, direct or indirect, in the Contract resulting from that solicitation."

### **Recusal Provisions of State Law**

In addition to the requirements of the City Code discussed above, members of City boards that exercise authority beyond that which is advisory are subject to a state law that requires a board to recuse when the member has a "substantial interest" in a person or entity that would be affected by a vote of the board. The state law provision is in chapter 171 of the Local Government Code. The state law is similar to the City Code provision and uses similar terminology, but differs in some important details and in the severity of the sanctions for a failure to comply.

To effectively recuse from a vote or decision under the state law, a board member should not only refrain from voting, but take no part in any discussions leading up to the vote. The exact words used in the state law are "shall abstain from further participation in the matter."<sup>26</sup>

When recusal is required under the state law, a board member with a substantial interest in a matter must file an affidavit with the City Clerk stating the interest and the nature of the interest. This affidavit must be filed before the vote.<sup>27</sup> (A copy of a form for this purpose is attached.) Recusal is required when it is reasonably foreseeable that the board action will have a "special economic effect" on the entity or real estate in which the board member has a substantial interest that is "distinguishable from the effect on the public."<sup>28</sup>

Because the personal financial statement filed by some board members under section 2-7-72 of the City Code requires disclosure of a board member's substantial interests (as that term is defined by the City ordinance), the financial statement may sometimes suffice for the affidavit required by state law in connection with a recusal. However, the definitions of substantial interest

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<sup>25</sup> See Tex. Att'y Gen. Op. Nos. JC-0124 (1999) at 2; JM-940 (1988) at 7, JM-282 (1984) at 8.

<sup>26</sup> Local Government Code, Section 171.004(a)

<sup>27</sup> Id.

<sup>28</sup> Id.

in the state law and the City ordinance differ. Sometimes the state law requires recusal where the City ordinance requires neither recusal nor disclosure on the financial statement.

### **Substantial Interest under the State Law**

The state law and City ordinance each define "substantial interest." The definitions are different and overlapping. That is, sometimes the state law definition is more restrictive, and sometimes the City Code definition is more restrictive.

A City ordinance may not be inconsistent with state law, so where the state law is more restrictive, it controls. On the other hand, chapter 171 of the Local Government Code provides that it "is cumulative of municipal charter provisions and municipal ordinances defining and prohibiting conflicts of interests." Chapter 171 is, therefore, read as being *in addition* to the City Code. That means, in effect, that the City Code may be more restrictive than the state law. The result is that where the Local Government Code is more restrictive, the Local Government Code controls, and where the City Code is more restrictive, the City Code controls.

Under the state law a person has a substantial interest in a business entity if:

(1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or

(2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.

Under the state law a person has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more.

For purposes of the state law, a substantial interest of a board member's relative in the first degree by consanguinity or affinity counts as the Board member's substantial interest.<sup>29</sup> Under the City Code, that interest is extended to the interests of a relative of the second degree, for members of boards that are not purely advisory.<sup>30</sup>

### **Sanctions for a Failure to Recuse Under the State Law**

If the failure to recuse is with respect to a "substantial interest" as the term is defined in the Local Government Code, then a board member could be subject to prosecution for a Class A

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<sup>29</sup> Local Government Code, Section 171.002. A relative in the first degree is a spouse, father, mother, son, or daughter, or a spouse's father, mother, son, or daughter.

<sup>30</sup> City Code, §2-7-65(C). A relative in the second degree is a sibling, a grandparent, a grandchild, the spouse of each of these, and the sibling, grandparents and grandchildren of your spouse.

misdemeanor. This offense is prosecuted by the County or District Attorney. It is punishable by a fine not to exceed \$4,000, up to a year in jail, or both.

## **Federal Law**

Generally, if a City board reviews a federally-funded project or activity, the members will be subject to the federal conflict of interest requirements attached to the federal program that is the source of the funding. Each federal program has a specific conflict of interest rule. Requirements set by various federal agencies may vary, and in each case the specific regulations with respect to the specific federal activity must be reviewed.

What follows is very general overview using a couple of Department of Housing and Urban Development (HUD) programs as an example. It is intended to suggest the framework of the federal approach to these issues.

HUD's conflict of interest rules for various programs generally apply in a similar manner and apply to a City official or agent who exercises a function or responsibility with respect to an activity, or who is in a position to participate in a decision-making process or gain inside information with regard to an activity under the program.<sup>31</sup> The rules prohibit an official, or a person with whom the official has a family or business tie, from having a financial interest in the federal activity. The prohibition applies during the official's tenure and for a year thereafter. HUD may grant a waiver if the nature of the conflict was publicly disclosed, if the conflict does not violate local or state law, and if HUD determines that granting the waiver will serve to further the purposes of the federal activity as well as the effective and efficient administration of the participating jurisdiction's program or project.<sup>32</sup>

Consequences for failure to comply could range from the loss of an opportunity to participate in a program to civil or criminal liability. Compliance with the federal conflict of interest requirements for a project will not ordinarily excuse failure to comply with local and state law requirements.

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<sup>31</sup> See, for example, 24 Code of Federal Regulations §570.611, Conflict of Interest (Community Development Block Grants); and 24 Code of Federal Regulations §574.625; Conflict of Interest (Housing Opportunities for Persons with Aids).

<sup>32</sup> Id.

## Citations

City Code provisions can be seen in their entirety and in context on-line at the Austin City Connection <http://www.ci.austin.tx.us/> and selecting "Code of Ordinances" from the "Select a Service" pull-down menu at the top of the page. Then select the link to "Volume I and Volume II, Code of Ordinances." By expanding the titles in the framed version, sections may be easily found. The first number of a City Code section is the title number.

State statutes can be seen in their entirety and in context on-line at the Texas Legislature Online <http://www.capitol.state.tx.us/> and selecting "State Statutes" from the menu on the left, under the heading "Research." The statutes are organized by code.

The Code of Federal regulations is available at the U.S. Government Printing Office's GPO Access site <http://www.gpoaccess.gov/cfr/index.html>.

Texas Attorney General opinions are available at <http://www.oag.state.tx.us/opinopen/opindex.shtml>, where they are indexed by number.

The attached form is for use when recusal is required under the Chapter 171 of the Local Government Code. Chapter 171 applies to a member of a board that has responsibilities beyond those that are advisory in nature. This affidavit must be filed with the City Clerk *before* the vote on which a member has a conflict.

For members of purely advisory boards the attached affidavit is not necessary.

However, when recusal is required under the City ordinance for a member of a purely advisory board or commission, a public disclosure of the nature and extent of the interest must appear “in the official records of the body.” Accordingly, a board member should take care that the disclosure appears in the board's official minutes.

**COMMISSION/BOARD MEMBER AFFIDAVIT**

**THE STATE OF TEXAS   §**

**COUNTY OF TRAVIS    §**

I, \_\_\_\_\_ as a member of the

\_\_\_\_\_ make this affidavit and hereby on oath state the  
(name of Board/Commission)

following: I, and/or a person or persons related to me in the first or second degree by affinity or consanguinity\*, have/has a substantial interest in a business entity or in real estate

that would be subject to a special economic effect by a vote or decision of the

\_\_\_\_\_ as those terms are used in Chapter  
(name Board/Commission)

171 of the Texas Local Government Code.

**(In the case of a substantial interest in a business entity fill out the following)**

**The business entity is:**

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Address)

\_\_\_\_\_ have/has a substantial interest in this  
("I" or name of relative and relationship)

business entity of the following reasons:

**(Check all that apply)**

\_\_\_ Ownership of 10% or more of the voting stock or shares of the business entity.

\_\_\_ Ownership of 10 percent or more or \$15,000 or more of the fair market value of the business entity.

\_\_\_ Funds received from the business entity exceed 10% of \_\_\_\_\_  
(my, his, her)  
gross income for the previous year.

**(In the case of a substantial interest in real estate fill out the following)**

**The real property is:**

\_\_\_\_\_  
(describe)

\_\_\_\_\_  
(address)

\_\_\_\_\_ have/has has an equitable or legal  
("I" or name of relative and relationship)

ownership of this property with a fair market value of \$2,500 or more.

On the filing of this affidavit with the City Clerk, I affirm that I will abstain from voting and from further participation in a decision involving the business entity or real property described above.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Signature of Board/Commission Member

**BEFORE ME, the undersigned authority, this day personally appeared**

\_\_\_\_\_ and on oath stated that the facts hereinabove  
(Name)

stated are true to the best of his/her knowledge or belief.

Sworn to and subscribed before me on this \_\_\_\_\_ day of \_\_\_\_\_,  
\_\_\_\_\_.

\_\_\_\_\_  
Notary Public in and for  
The State of Texas

\_\_\_\_\_  
Printed Name of Notary Public

My commission expires:  
\_\_\_\_\_

\*Your first degree relatives by consanguinity (blood) are your parents and children. Your first degree relatives by affinity (marriage) are your spouse, your spouse's children, and your children's and parent's spouses. Your second degree relatives by consanguinity are your brothers, sisters, grandparents, and grandchildren. Your second degree relatives by affinity are your spouse's brothers, sisters, grandparents, and grandchildren, and the spouses of your brothers, sisters, grandparents, and grandchildren. For this purpose, a marriage that has ended because of death or divorce is considered to continue as long as a child of that marriage is living.